

# It's not about a seat at the table. It's about the table.

---

Maximilian Steinbeis

2020-02-14T14:40:48

May I ask you something, Mr. Merz? We don't know each other, and I don't assume that you are among the subscribers of the Verfassungsblog editorial, but maybe this will reach you somehow, you never know. I have a request, if you allow. It's not personal, it's not about doing *me* a favor, but to your party, to your country, to all of us and last but not least to yourself.

Don't run! Or if you do: don't win.

I'm not saying this as your political opponent. I guess I am just that, but that's not the point. This is not about the policies you'd implement and for which you want to be democratically elected. I probably wouldn't agree with those, but if it were just that I would not vote for you and be done with it. But that is not what matters.

In the race for the CDU chairmanship and chancellor candidacy in Germany, you are the hope of those who think that the CDU should make efforts to win back the former conservative voters it has lost to the far-right AfD. The AfD, according to that hope, consists of a hard core of racists, fascists and thugs, badass swastika-tattooed wolves wrapped in bourgeois conservative sheepskin, so to speak, from whom you'd distance yourself in the harshest possible terms, of course. But along with them, the hope goes, there are also plenty of harmless and hapless CDU lambs cavorting about in the AfD, who only have run away because of the lack of order and stern male leadership in the CDU headquarter, and would happily and with many a baa and bleat come galloping back to you at your commanding whistle.

But that is not so. Or rather: it may well be that all sorts of animals would come galloping. But not many lambs, though.

What distinguishes the AfD from the CDU is probably not so much the attitude. Let's face it, there are enough racists, sexists, islamophobes and climate deniers in your party too, aren't there? The difference seems to me to be not so much substantial but instrumental. The CDU fights for majority and power within the framework of written and unwritten rules of the game, which make an open competition between diverse values and interests for majority and power possible in the first place. As far as these rules of the game are concerned, the CDU is conservative in the best sense of the word: don't touch them unless you absolutely have to! Otherwise the whole system will stop functioning, and who, regardless of goals and values, would want that?

Well, let me tell you: The AfD is who. It is the party of those who no longer hope to win within the framework of these rules. It is the party of those who are prepared to sabotage and destroy those rules as long as they are in the minority, and to

manipulate and adapt them to their interests once they are in power. It is the party of those who, before letting go of their racism/sexism/etc., prefer to stop being conservative.

Alexander Gauland, the AfD top dog on the federal level, has announced that his party in Thuringia will vote for the left-wing incumbent<sup>1)</sup> not technically, but... Bodo Ramelow in the third round of elections. There you have it: that as a member of parliament in an election you actually say with your vote what you mean and mean what you say, namely that you want to empower the elected – this is an unwritten convention which was until recently so self-evident that hardly anyone was even aware of its existence. The constitutional order is full of such unwritten conventions, the dark matter of constitutional law, so to speak, whose gravitational force is necessary to hold the universe together. For the AfD and its ilk, on the other hand, all these conventions are just opportunities to change the rules to their favour, an inexhaustible arsenal of potential weapons to attack the addressees of their *ressentiment* with.

Another example from the possibly not so distant future: Let's assume that a state government with AfD participation would actually be formed in Thuringia or elsewhere one day. That would mean that the AfD would then get one or more seats in the *Bundesrat*. The second chamber of Parliament in Germany is, as far as I can see, completely unprotected against destructive behaviour by its members – probably because nobody has yet come up with the idea that such behaviour is possible or even sensible. So, if an AfD person suddenly stood up in the *Bundesrat* assembly one sunny Friday afternoon and pulled off a classic filibuster, for example, to block a vote and derail a piece of federal legislation – there would be no legal basis for doing anything against it at all.

In the USA, Republicans started with this destructive instrumentalisation of informal constitutional conventions a quarter of a century ago. In the United Kingdom, the Tories under Boris Johnson took the same path last year. Both parties may serve as illustrations of where this road leads. Conservatives in the aforesaid sense no longer exist in these parties, or if they do, they end up as tragical figures.

Dear Mr. Merz, you are no Boris Johnson. You are no Donald Trump and you are no Newt Gingrich. Even if you wanted to, you are too old and too well-behaved and too much of a corporate suit for this role, it would not fit you and nobody would believe it. You wouldn't be the destroyer. You'd be the destroyed. You'd be, if you will, John McCain. You'd be Theresa May. You'd be the one who wants to ride the tiger just to get eaten by it. (Wouldn't he, Mr. Spahn?)

So, again: Don't do it!

## Horseshoe Throwing in Thuringia

There is certainly no lack of people in the CDU who are determined to take exactly this path, above all that figure who until not so long ago was entrusted with the so-called protection of the constitution<sup>2)</sup> I'll never get over the irony. at federal level:

Hans-Georg Maaßen. He has placed himself at the head of those who demand an "opening to the right" from the CDU and who, against all evidence but with the greatest persistence, insist that the greatest danger to state, law and constitution emanates from the left. What lies behind this bizarre position is analyzed by [TIM WIHL](#) in a very worthwhile blog post:

Maaßen therefore, along with some (by no means all!) parts of the CDU and FDP, seems to want to defend the state as a form that no longer has any democratic content. In this he agrees with the AfD. This state is an statist shell which is detached from any reference to human rights as its constitutional raison.

But the fact that the public could be mobilized so quickly, clearly and en masse against the coup of Thuringia has revealed that in a democratic state it is not this "statist shell" but human and equality law that is the criterion for who is to exercise power in it. Not the AfD in particular. The horseshoe, that fatal symbol of the equation of left- and right-wing criticism of state and constitution for the self-elevation of the supposed centre, has finally landed – hopefully for good – in the scrap bin of the history of political ideas.

The Chancellor's reaction was quick and clear, but for some it opened up a new area of conflict: What, *that* lady again? How is this *her* business? Is she even *allowed* to speak up in this matter? In the *Frankfurter Allgemeine Zeitung*, legal editor Reinhard Müller was very much scandalized by the fact that Angela Merkel had called the Thuringia affair "unforgivable" and demanded that it be reversed, instead of minding her own Federal business and sticking to the alleged rule that a Federal Chancellor should remain neutral towards party squabble – a violation of "democratic form", the FAZ editor believes. This has provoked a rather stinging critique by [CHRISTOPH MÖLLERS](#):

In the dream of an apolitical government, bourgeois political aversion, the after-effect of the comfort of the old Bundesrepublik, the belief in the pre-political self-sufficiency of the constitutional state, but perhaps also an intellectually emaciated legal education form an alliance that strays far from the understanding of politics of the Grundgesetz. "Preserving the democratic form" – whatever that means, it cannot mean being politically neutral. Here Müller, but not only he, confuses democracy and the rule of law. The form of democracy is the form of politics.

The AfD could be seen in action this week at the Federal Constitutional Court, where its case against Federal Home Secretary Horst Seehofer was heard. The ministry had posted an interview with the minister on its website, in which he described the AfD as "state-destroying". The AfD trial representative Ulrich Vosgerau – a man whose greatest achievement to date is to have coined the word "the rule of lawlessness" in the 2015 refugee crisis – allowed a deep look into the self-perception of this party when he confronted the court with, well, how shall I put it... a threat: "Sooner or later the AfD will also provide the Federal Home Secretary," Vosgerau informed the bench, as [VIKTORIA BUDNIK](#) and [MARYAM KAMIL ABDULSALAM](#)

report. "Maybe already in 5 years." I suppose this tells us all about the "democratic form" as envisioned by the AfD we need to know.

In **Thuringia**, the unseated PM Bodo Ramelow is hoping to form a minority government for a transitional period, in order to have the budget approved and then ask for a vote of confidence. This, so his hope, would automatically open the way to new elections if the parliament does not elect a successor for 21 days. [MICHAEL HEIN](#) points out, however, that this approach would give the AfD a new chance to play another of its games: what if they put up a PM candidate of their own during these 21 days? Hein recommends to dissolve parliament by a two-thirds majority instead and then amend the contradictory provisions in the Thuringian constitution.

By the way, the idea of [MICHAEL MEIER](#) and [ROBERT WILLE](#) from last Friday, according to which the ministers of the Ramelow government are by no means dismissed, apparently made a big splash in Thuringia in the meantime. At least that is what the [WELT](#) reported in a detailed newspaper report. Meier and Wille's views are my no means shared by all legal experts, and there is in fact a rather lively [discussion](#) going on about it.

## UK, Ireland, Bulgaria

The **United Kingdom** is facing hard times when it comes to human rights and judicial protection. Following Boris Johnson's cabinet reshuffle, the office of Advocate General is now in the hands of a so-far little known lady named Suella Braverman, whose legal policy ideas were on display [here](#) only a few days ago:

Parliament's legitimacy is unrivalled and the reason why we must take back control, not just from the EU, but from the judiciary.

So, now as we're done with the filthy Eurocrats we'll take on our own judges, is that it? Show those enemies of the people with their pompous wigs and their smug elitist faces who is master now in Boris Johnson's realm? Mr. Kaczyński and Mr. Ziobro, please welcome Ms. Braverman, it looks like you got company. The difference is that, unlike Poland, the UK is no longer an EU member state, and if the Tory-dominated Parliament in its unrivalled legitimacy decides to smash the judiciary to dust and little pieces there is no supranational and very little international leverage left to stop it. The Supreme Court has been in the government's crosshairs ever since it dared prop itself up as a quasi-constitutional court in the Brexit fight. The Human Rights Act has been considered fair game by the Tory right-wingers long before Boris Johnson. In the meantime, though, the Supreme Court seems to be making provisions for darker times and increasingly bases human rights not just on the besieged ECHR, but directly on [common law](#).

Among the sacked in Boris Johnson's cabinet is also Northern Ireland Secretary Julian Smith who was actually deemed rather successful, getting the dysfunctional Northern Ireland government back on track after three years of blockage and all. But that apparently was no excuse in the eyes of 10 Downing Street for his sympathies towards investigating human rights violations committed by the army during the

"troubles". BTW, if you want to know the wrinkles of academia where much of this came from, [here](#) is what I found out a few weeks ago.

In the script of right-wing populist institutional capture, the freedom of the media must not be missing as a hostile takeover target. [PAOLO CAVALIERE](#) describes what Johnson's government has in mind in this respect: The BBC is put under financial strain, and the unwritten convention – here we go again – that you don't invite only your favourite journalists to government press statements but everyone, is turned upside down all of a sudden.

**Ireland** has voted, three parties neck-and-neck, the left-wing nationalist Sinn Fein has won big, and who knows? Northern Ireland, abandoned and sold out by the English Brexiteers, may find itself united with the Republic of Ireland sooner than many think. Over at the IACL blog there is an interesting [online symposium](#) going on right now about how this might happen.

In **Bulgaria**, the government has been playing cat and mouse with the Council of Europe and the European Court of Human Rights for ten years now, with the impenetrable jungle of power surrounding the position of Attorney General as undisturbed as ever. The whole unbelievable story is told by [RADOSVETA VASSILIEVA](#).

## Borders and migrants

The protection of human rights suffered a dreadful setback yesterday in Strasbourg. In the case of *N.D. and N.T. v. Spain*, the Grand Chamber of the ECtHR decided that pushbacks at the EU external border with Morocco without a hearing and legal protection are quite alright as far as human rights are concerned. Never mind that the Convention provides for a right to an effective appeal (Article 13) and a ban on mass expulsions (Article 4(4)). In the eyes of the Grand Chamber the plaintiffs themselves were to blame: They could have made use of the legal possibilities to apply for asylum at the border instead of trying to overcome the border fortifications illegally.

In doing so, according to [DANA SCHMALZ](#) and [MAXIMILIAN PICHL](#), the Court, on the one hand, disregards the wording of the ban on collective expulsion, which does not provide for such a condition – a dangerous precedent: since when does expulsion become more or less collective, depending on the existence of a legal possibility of entry? On top of that, however, the ruling promotes the narrative of hordes of refugees violently forcing their way into the EU in masses, instead of recognising that the border fortifications of Spain and the externalisation of refugee protection by the EU are where the chain of causation starts here. A shocking judgment, according to Pichl and Schmalz, which is likely to shake confidence in the ECtHR as a defender of human rights in these times of crisis.

We expect some more opinions on this topic, so watch this space. For the time being, I too have the impression that the Court here was indeed more interested in protecting states from people than vice versa.

By the way, if you really want to screw up your weekend, you should read the two minority opinions. Particularly the one of the Czech judge Aleš Pejchal, which seems to follow the motto: how to pin human-rights communitarianism on poor old Rawls who can't defend himself any more and why Africans should better seek their rights on "their continent" if they absolutely have to. Sweet Lord Jesus, have mercy upon us.

But all hope is not lost: [CARLOS OVIEDO MORENO](#) also considers the ECtHR judgment a "slap in the face", especially since the Spanish Constitutional Court has made it clear only in 2018 that the interpretation of human rights under international law is also constitutionally binding. However, this did not rule out the possibility of demanding higher standards. Since the alleged legal entry alternatives on which the ECtHR bases its judgment do not exist in reality, everything now depends on overturning the law on which the border regime is based. This could be done by the Spanish Constitutional Court, where a case is pending – or by the left-wing majority in parliament.

## Germany

Germany's drama about its electoral law, which threatens to inflate the number of MPs into grotesque dimensions, may look a bit First World problems by comparison. The main blame lies with the CDU/CSU MPs who mostly insist on keeping the advantage of being the relatively least weak party in many parts of Germany and thus having the best chances to sweep up a maximum of direct mandates. The SPD has now tabled a new reform proposal which aims to cap the number of Bundestag mandates at 690. [JEROME SCHRÖDER](#) has taken a closer look at the plan and finds it hardly viable constitutionally.

In Schleswig-Holstein and Hamburg, the debate about niqab- and burqa-wearing schoolgirls and students is settled for the time being. Meanwhile, we talked to [CHRISTIAN WALDHOFF](#) about where he would draw the line between a general burqa ban and special situations such as school or university, and what distinguishes both from each other.

Finally: many thanks to all who have shown us their appreciation for our work during the last week! The number of our supporters on [Steady](#) is rising slowly but steadily<sup>3)</sup> no pun intended. and is now at 278 – greatly appreciated, every single one of you! As always, our Paypal account is paypal@verfassungsblog.de, and if you chose to contribute via bank transfer (IBAN: DE41 1001 0010 0923 7441 03, BIC: PBNKDEFF), we'd be overjoyed, too.

All the best to you, and don't let your courage sink (not even you, Mr. Merz),

Max Steinbeis

### References

- 1. not technically, but...

- 2. I'll never get over the irony.
- 3. no pun intended.

